

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

NORTH AMERICAN BUTTERFLY
ASSOCIATION d/b/d THE
NATIONAL BUTTERFLY CENTER
AND MARIANNA TREVINO

Plaintiffs

VS.

NEUHAUS & SONS, LLC, BRIAN
KOLFAGE, AND WE BUILD THE
WALL INC.

Defendants

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CASE NO. _____

DEFENDANT'S NOTICE OF REMOVAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant NEUHAUS & SONS, LLC and files this Notice of Removal and removes to this Court a state court action that is pending in the 398th Judicial District Court of Hidalgo County, Cause No. C-5049-19-I, and in support of such removal would respectfully show as follows:

I. Procedural Background

On or about December 3, 2019, Plaintiffs North American Butterfly Association d/b/a The National Butterfly Center (hereinafter “NABA”), and Marianna Trevino Wright filed an Original Petition and Application for Injunctive Relief in Cause No. C-5049-19-I, in the 398th Judicial District Court of Hidalgo County, Texas. In that action, Plaintiff NABA alleges that it owns property near property owned by Defendant, Neuhaus & Sons LLC, and that Defendants are constructing an illegal border fence in the US floodplain along the banks of the Rio Grande River on Neuhaus’ property which will possibly impact

NABA's property by changing the flow of surface water of the Rio Grande River. NABA claims that Defendants' actions violate the Texas Water Code and NABA claims the Defendants' actions ignore the requests of the International Boundary and Water Commission (IBWC) to cease construction and to obtain permits from the IBWC. NABA further claims that the IBWC needs time to study plans and confirm compliance with international treaties.

NABA asked the state court for a temporary restraining order and injunction to prevent Defendants from constructing a border fence on Neuhaus' property. Plaintiffs also allege a defamation claim against "Defendants", but the claim seems directed at statements made by other defendants and not Neuhaus & Sons, LLC, as this Defendant has not made any public communications about Plaintiffs. On, December 3, 2019, an ex parte temporary restraining order was entered by the state district court prohibiting the Defendants in that action from constructing a border wall.

On December 5, 2019, Defendant, Neuhaus & Sons, LLC was also sued in a Federal Court action by the United States of America ("USA"), Cause No. 7:19-CV-403, in the United States District Court, Southern District of Texas, McAllen Division. In that action, the United States of America claims that the International Boundary and Water Commission, United States and Mexico, United States Section ("USIBWC"), a federal commission, has sole jurisdiction, pursuant to federal law and United States treaties, to approve plans for construction in the US floodplain along the Rio Grande river border with Mexico. In that action, the USA asked for a temporary restraining order, and after a hearing on December 5, 2019, conducted with several, but not all Defendants, Judge Crane entered a restraining order regarding construction of the border fence on

Defendant's property, the same property and same border fence complained of in the NABA lawsuit.

II. Basis for Removal

Defendant is entitled to remove this cause, pursuant to 28 U.S.C. §1331, because the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. Federal jurisdiction in this case is mandated by the existence of a particular federal question. According to the United States, the 1970 Treaty (*Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, U.S.-Mex*, Art. IV, Nov. 23, 1970 T.I.A.S. 7313) between the United States and Mexico along with several related federal statutes (22 U.S.C. § 277b; 22 U.S.C. § 277d-35; 22 U.S.C. § 277d-34; 22 U.S.C.A. § 277d-37) serves to provide exclusive federal question jurisdiction over the subject construction of the border fence in the flood plain along the Rio Grande, which is the subject of both lawsuits. As noted above, Plaintiff in the removed action, recognizes the IBWC' authority for permitting, construction, and drainage along the Rio Grande River. As such, this case is removable under federal question jurisdiction since substantial federal issues are raised that should be resolved in federal court.

The lawsuit was filed December, 3, 2019. Defendant was served with process in this case at 5:00 o'clock p.m. on December 3, 2019. This notice of removal is timely in that it was filed within 30 days of receipt of service of this matter on Defendant.

Pursuant to 28 U.S.C. § 1446(d), Defendant has filed a copy of the Notice of Removal with the clerk of the Court in the state court action being removed, and has given notice thereof to all adverse parties.

Pursuant to Southern District of Texas Local Rule 81, copies of the following documents are hereby provided to the clerk for filing in connection with this Notice of Removal:

1. All executed process in the case, attached hereto as Exhibit "A"
2. Pleadings asserting causes of action, e.g., petitions, counterclaims, cross actions, third-party actions, interventions and all answers to such pleadings, attached hereto as Exhibit "B";
3. All orders signed by the state judge, attached hereto as Exhibit "C";
4. The docket sheet, attached hereto as Exhibit "D";
5. An index of matters being filed, attached hereto as Exhibit "E";
6. A list of all counsel of record, including addresses, telephone numbers and parties represented, attached hereto as Exhibit "F";
7. A copy of the Notice of Consent to Removal filed on behalf of the Co-Defendant who was served with the removed suit, attached hereto as Exhibit "G".

III. Conclusion and Prayer

The basis for removal, and this Court's jurisdiction, is federal question jurisdiction under 28 U.S.C. § 1331. The construction project sought to be enjoined in the state court action is already subject to the jurisdiction of this Federal Court in a separate but related action brought by the United States of America, pleading jurisdiction pursuant to federal law and United States Treaties with Mexico. Accordingly, there is federal question jurisdiction of this matter.

WHEREFORE, Defendant Neuhaus & Sons, LLC respectfully requests that the above-entitled action be removed from the 398th Judicial District Court of Hidalgo County, Texas to the United States District Court for the Southern District of Texas, McAllen Division.

Respectfully submitted,

JONES, GALLIGAN, KEY & LOZANO, L.L.P.

By:



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CERTIFICATE OF SERVICE

I certify that on December 13, 2019, a copy of the foregoing was electronically filed using the CM/ECF system, which will automatically serve a Notice of Filing on the following attorneys:

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